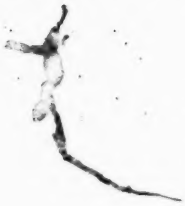

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 693

JOHN VANCE TAYLOR,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

R. PALMER INGRAM,
Counsel for Petitioner.

HELEN ELIZABETH BROWN,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. .

JOHN VANCE TAYLOR,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Justices of the Supreme Court of the United States:

The Petitioner, John Vance Taylor of Baltimore, Maryland, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit entered in the above entitled case on the 13th day of January, 1932 (R. 32-36), affirming a judgment of the United States District Court for the District of Maryland (R. 16-19), upholding the search of a garage which was part of a residence premises at 2:30 at night without a search warrant.

QUESTIONS PRESENTED.

1. Whether the protection afforded a "private dwelling" by Section 25, Title 2 of the National Prohibition Act, or a "house" by the Fourth Amendment to the

Constitution of the United States extends to the garage on the same city lot and used as a part of the residence premises?

2. Whether the unlawful breaking, forcible entry and search of the garage used as part of the residence premises at 2:30 at night *was reasonable* within the contemplation of the Fourth and Fifth Amendments to the Constitution of the United States?

3. Whether the search and seizure was not the primary object of the arresting officers as no person was present and engaged in the commission of any offense at the time of the entry?

4. Whether the evidence so obtained and the information gained as a result of such search and seizure should have been admitted in evidence over the seasonable objection of the defendant (appellant)?

STATEMENT.

On the night of November 19, 1930, a squad of more than six Prohibition Agents returning to Baltimore City after patrolling the roads in the vicinity for half the night, fell to discussing a premises in the Curtis Bay section of the City about which they had complaints. They were skeptical about these complaints and had not made any investigation because the place in question was just across the alley from a police station. As a result of this discussion they decided to investigate and arrived at Petitioner's home at about 2:30 on the morning of November 20th. The premises consisted of a house and a one-car, metal garage built on a corner city lot. A board fence extended from the back of the house to one side of the garage. The double doors of the garage opened onto the side street. One side of the garage extended along

the end of the lot next to an alley. When the agents arrived at the premises at this hour of the night they saw no one and saw no evidence of any activity whatever. They walked up to the double doors of the garage and pulled them open as far as the hasp would allow, thereby making a small crack between the doors. One of the agents held a flashlight to an inch and a half or two inch crack underneath the doors. Through these cracks the agents claimed they saw pasteboard cartons which contained ordinary Mason jars. They could not see inside the cases and admitted they did not know what was in them. Two of the agents said they got the odor of whisky while they were looking through the cracks, but the agent, longest in the service, who was holding the flashlight to the crack under the doors, testified that he could not say he detected the odor of whisky. The agents then discovered a small door in the side of the garage which was enclosed by the fence and which opened into Petitioner's back yard. One agent entered the back yard by climbing over the fence. Going to the door which led into the garage he broke off the hasp and in this way entered the garage where one hundred twenty-two cases of white corn whisky were found. After the entry had been made and while the search was in progress, the Petitioner appeared on the sidewalk, was arrested by two of the agents and taken into the garage which was being searched by other agents. After his arrest, Taylor was permitted to go into the house for his coat and the agent who went with him and other agents testified that the premises was used as the private home of Petitioner. The agents had no search warrant for the garage and at no time had they endeavored to obtain a search warrant from the United States Commissioner.

As a result of this search and seizure an indictment was filed against Petitioner charging violation of Title 2, Sec-

tions 3, 25 and 29 of the Act of October 28, 1919, known as the National Prohibition Act. A Motion to Suppress the Evidence and Quash the Indictment was filed and overruled by the trial Court. A plea of "not guilty" was entered, a jury trial waived, and the Court, sitting as a jury, found Petitioner guilty as charged in the indictment and sentenced him to be imprisoned for three months in jail and to pay a fine of Seven Hundred Fifty ($750.00) Dollars and costs.

From this judgment the Petitioner appealed to the Circuit Court of Appeals, and upon which appeal the Circuit Court of Appeals rendered an opinion and made an Order affirming the judgment of the District Court.

The Petitioner, before his trial, sought to suppress the evidence on the ground that the search and seizure were illegally made. This was the precise point raised in the Circuit Court of Appeals. The Circuit Court of Appeals, however, affirmed the judgment of the District Court on the ground that the garage was not directly connected with the dwelling house.

SPECIFICATIONS OF ERRORS.

1. The Circuit Court of Appeals erred in its ruling that the garage was no part of the private dwelling.

2. The Circuit Court of Appeals erred in holding that the unlawful breaking, forcible entry and search of these premises at 2:30 at night without a search warrant was not unreasonable within the contemplation of the Fourth and Fifth Amendments to the Constitution of the United States.

3. The Circuit Court erred in ignoring the difference laid down by this Honorable Court between the *search of*

a permanent structure for which a proper warrant may be obtained and the *search of a moving vehicle.*

4. The Court erred in attempting to justify the forcible entry on the ground that an odor of whisky was evidence of a crime committed in the presence of the officers when in fact no one was in the garage and the officers knew no person was present and committing a crime.

5. The Circuit Court erred in admitting the evidence so obtained and the information gained as a result of such search and seizure, a seasonable objection having been interposed.

REASONS FOR GRANTING THE WRIT.

1. The opinion of the Circuit Court of Appeals is unsound in law and is against the weight of adjudicated cases.

2. The opinion of the Circuit Court of Appeals is based upon decisions in cases where search warrants had been issued or where the facts were entirely different from those in the instant case.

3. The Circuit Court of Appeals has rendered its opinion against the provisions of the Constitution of the United States and the Amendments thereto, and more particularly the Fourth and Fifth Amendments.

4. The question is of great importance affecting the Constitutional rights against illegal search and seizure, without a search warrant, of probably millions of citizens having homes, in that the Court is called upon to define a "private dwelling" (concerning which term as used in Section 25, Title 2 of the National Prohibition Act, there is much conflict in the Circuits) and what protection from

search and seizure is given a private dwelling by Section 25, Title 2 of the National Prohibition Act and by the Fourth Amendment to the Constitution of the United States.

5. There is much conflict on the question. The District Courts of the First and Second Circuits and the Circuit Courts for the Fifth, Sixth, Eighth and Ninth Circuits uphold Petitioner's contention, while the Circuit Court for the Fourth Circuit alone denies it, and the question has not been raised or decided in the other Circuits as far as counsel have been able to ascertain.

6. To give sanction to the decision of the Circuit Court of Appeals in the instant case, would be tantamount to nullifying and rendering meaningless the Act of November 23, 1921, Ch. 134, Par. 6, 42 Stat. at L. 222, 223, 18 U. S. C. A., Sec. 53, in which Congress made it a criminal offense, punishable by heavy penalties, for any officer, agent, or employee of the United States, engaged in the enforcement of any law, to invade the homes of the people and violate the privacies of life without a warrant.

7. To sanction this decision would be to allow petty Government officers to usurp judicial powers and set up their own opinions as a substitute for the judicial determination of probable cause supported by the oath or affirmation required by the Constitution before homes can be invaded in a search for evidence.

8. If the decision of the Circuit Court of Appeals is permitted to stand it will encourage federal prohibition agents to violate the very law they were employed by the United States Government to enforce and to violate the Constitutional protection guaraneed to citizens and their

homes by the Fourth and Fifth Amendments to the Constitution of the United States, and the peaceful and quiet enjoyment of their homes by citizens in either day or night time will constantly be subject to invasion and exploratory searches without legal process by Government officers whose curiosity is aroused or who wish to test speculations resulting from anonymous complaints.

9. The question involved is of vital importance to every citizen and merits the consideration of this Honorable Court.

For the foregoing reasons and those which hereinafter appear in the brief and argument, your Petitioner respectfully prays that his petition be granted.

R. PALMER INGRAM,
Counsel for Petitioner.

HELEN ELIZABETH BROWN,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1931.

No. .

JOHN VANCE TAYLOR,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit has not been officially reported up to the time of the filing of this Brief. The opinion was rendered on the 12th day of January, 1932, and is set forth on pages 32-36 of the Record.

JURISDICTION.

1. The date of the judgment to be reviewed is January 13, 1932 (R. 37). On January 14, 1932, the Circuit Court of Appeals for the Fourth Circuit passed an Order staying its mandate to the District Court provided that your Petitioner file his application for a writ of certiorari in this Honorable Court within thirty days from said date (R. 37-38).

2. The nature of the case and the rulings below which are sought to be reviewed herein are stated in the Petition for Certiorari and are discussed hereinafter in this Brief.

3. The statutory provision invoked to sustain the jurisdiction of this Honorable Court is the Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stats. 938.

STATEMENT OF CASE.

A statement of the case has been given in the Petition for Certiorari, and in the interest of brevity is not repeated here.

SPECIFICATIONS OF ERRORS.

1. The Circuit Court of Appeals erred in its ruling that the garage was no part of the private dwelling.

2. The Circuit Court of Appeals erred in holding that the unlawful breaking, forcible entry and search of these premises at 2:30 at night without a search warrant was not unreasonable within the contemplation of the Fourth and Fifth Amendments to the Constitution of the United States.

3. The Circuit Court erred in ignoring the difference laid down by this Honorable Court between the *search of a permanent structure* for which a proper warrant may be obtained and the *search of a moving vehicle.*

4. The Court erred in attempting to justify the forcible entry on the ground that an odor of whisky was evidence of a crime committed in the presence of the officers when in fact no one was in the garage and the officers knew no person was present and committing a crime.

5. The Circuit Court erred in admitting the evidence so obtained and the information gained as a result of such search and seizure, a seasonable objection having been interposed.

ARGUMENT.

This case presents a question of the greatest importance, affecting the Constitutional rights against illegal search and seizure, without a search warrant. The question is as to the right of Government agents to forcibly enter the house of a citizen of the United States without a search warrant at 2:30 at night and there make an illegal search and seizure of intoxicating liquors in violation of the Petitioner's Constitutional rights. In the trial Court the Government admitted that the premises concerned is a private dwelling occupied as such by the Petitioner (R. 16).

There is some conflict of authority concerning the definition of the term "private dwelling" in the different Courts, Circuit and District, but in the instant case the Circuit Court of Appeals goes far beyond any reported case in denying to any part of a premises used as a home the protection of Section 25, Title 2 of the National Prohibition Act and of the Fourth Amendment.

The effect of the opinion of the Circuit Court of Appeals is to place an unjustifiably narrow interpretation upon the term "private dwelling" as used in Section 25, Title 2, National Prohibition Act, and to limit the Fourth Amendment to the Constitution by such interpretation. Such an interpretation is in direct conflict with a prior decision of the Circuit Court of Appeals in Henderson v. United States, 12 F. (2) 528, 529, one of the cases cited in the opinion of the Circuit Court. The Court has at-

tempted, in the opinion of counsel, to divorce from the main house those buildings convenient and necessary to the occupancy of the premises described as "within the curtilage."

It has repeatedly been held that a garage is a part of a residence premises, and such ruling is upheld by Hale, Blackstone, Greenleaf, Bishop and all the textwriters.

Temperani v. United States, 299 Fed. 365.
Bare v. Commonwealth, 122 Va. 783.
Devoe v. Commonwealth, 3 Met. 316, 325.
United States v. Slusser, 270 Fed. 818.

But, so far as Constitutional rights are concerned, it is of no consequence whether the place where the liquors were seized is characterized as a "private dwelling" or a "house" within the meaning of the Fourth Amendment. The protection of the Fourth Amendment includes garages, barns and other structures.

Temperani v. United States, supra.
United States v. Slusser, supra.

The search of a dwelling for intoxicating liquor without a warrant is strictly prohibited. And the issuance of a search warrant for such a premises is definitely limited.

National Prohibition Act, Sec. 25, Title 2, 27 U. S. C. A., Sec. 39;
Espionage Act of June 1, 1917, Title 11, 18 U. S. C. A., Sec. 611 et seq.;
Singleton v. United States, 290 Fed. 130;
Staker v. United States, 5 F. (2) 312;
Lindsly v. United States, 12 F. (2) 771;
Thompson v. United States, 22 F. (2) 134;
Carroll v. United States, 267 U. S. 132;

Agnello v. United States, 269 U. S. 20, 30;
United States v. Dean, 50 F. (2) 905, 906;
Schroeder v. United States, 14 F. (2) 500;
Alvau v. United States, 33 F. (2) 467, 470.

In Thompson v. United States, supra, previously decided, the Circuit Court of Appeals, speaking through Judge Soper, said:

> "It is well settled that the effect of the provisions of the Fourth Amendment to the Constitution of the United States, of Section 25 of title 2 of the National Prohibition Act (27 U. S. C. A., Sec. 39), and title 11 of the Espionage Act of June 15, 1917 (40 Stat. 288; 18 U. S. C. A., Sec. 1611 et seq.), is to forbid the search of a private dwelling by a national prohibition agent without a search warrant, and to require that a search warrant shall not issue to search a private dwelling, unless it is being used for the unlawful sale of intoxicating liquor."

In Staker v. United States, 5 F(2) 312, 314, the Circuit Court of Appeals, Sixth Circuit, said:

> "The officers had no probable cause to believe from the smell alone that the dwelling house was being used for sales. *The situation did not justify a search without a warrant* (Italics ours). The policy of the Statute goes far to restrict the right of searching a dwelling even with a warrant. Such policy cannot be frittered away by granting a broader right of search without a warrant."

This Honorable Court in Agnello v. United States, supra, citing the Temperani case, condemned the search of dwellings without a warrant. Mr. Justice Butler said:

> "While the question has never been directly decided by this Court, it has always been assumed that

one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein."

Boyd v. United States, 116 U. S. 616, 624 et seq. 630.
Weeks v. United States, 232 U. S. 383.
Silverthorne Lumber Co. v. United States, 251 U. S. 385.
Gouled v. United States, 255 U. S. 298, 308.

"The protection of the Fourth Amendment extends to all equally,—to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant. On the other hand, special limitations have been set about the obtaining of search warrants for that purpose. Thus, the National Prohibition Act, approved October 28, 1919, c. 85, Tit. 11, sec. 25, 41 Stat. 305, 315, provides that no search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor or is in part used for business purposes, such as store, shop, saloon, restaurant, hotel or boarding house.

"And later to the end that government employees without a warrant shall not invade the homes of the people and violate the privacies of life, Congress made it a criminal offense, punishable by heavy penalties, for any officer, agent or employee of the United States engaged in the enforcement of any law to search a private dwelling house without a warrant directing such a search.

Act of November 23, 1921, c. 134, sec. 6, 42, Stat. 222, 223.

"Safeguards similar to the Fourth Amendment are deemed necessary and have been provided in the

Constitution and laws of every state of the Union. We think there is no State Statute authorizing the search of a house without a warrant; and, in a number of States laws recently enacted for the enforcement of prohibition in respect of intoxicating liquors, there are provisions similar to those in sec. 25 of the National Prohibition Act. Save in certain cases incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant.

"Absence of any judicial approval is persuasive authority that it is unlawful. See

Entick v. Carrington, 19 Howard's State Trials, 1030, 1066.

"Beliefs however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause. See

Temperani v. United States, 229 Fed. 365.
United States v. Rembert, 284 Fed. 996, 1000.
Connelly v. United States, 275 Fed. 509.
McClurg v. Brenton, 123 Ia. 368, 372.
People v. Margolis, 200 Mich. 431.
Childers v. Commonwealth, 198 Ky. 848.
State v. Warfield, 184 Wis. 56.

"The search of Frank Agnello's house and seizure of the can of cocaine violated the Fourth Amendment."

ENTRY BY FORCE AT 2:30 AT NIGHT.

The breaking into and search of any building at 2.30 o'clock at night is unreasonable and a wanton violation of the Fourth Amendment. The violation of the Constitution becomes even more grave when the building forcibly entered and searched was part of a dwelling and the occupant was aroused from his sleep.

In Alvau v. United States, 33 F(2) 467, 470, the Circuit Court of Appeals for the Ninth Circuit, said:

> "Forcibly and in the nighttime to enter an occupied residence, even though it is thought to be used in part for unlawful purposes, is likely to be attended with disorder, and to result in violence and tragic consequences. We feel constrained to hold that the search was unreasonable and in violation of the Constitutional rights, and that therefore the evidence was inadmissible."

This phase of the case was not considered in the opinion of the Circuit Court in the instant case. And the Circuit Court disregarded the ruling often laid down by this Honorable Court concerning the difference between the search of a permanent structure and a moving vehicle, and repeated in the *Agnello Case:*

> "We have made a somewhat extended reference to these Statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structures in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

NO PERSON PRESENT.

The forcible entry and search in this case could not have come within the exception mentioned in the Agnello Case of a search "incident to a lawful arrest," because no person was present. No one was engaged in the commission of a crime and subject by reason thereof to arrest. There was no one in the garage and the Govern-

ment agents not only did not suspect that anyone was there, but they actually *knew* by peeping through cracks between the doors before they forced their way in that no one was there. The search and seizure cannot be justified as incident to a lawful arrest.

Temperani v. United States, 299 Fed. 365.
Henderson v. United States, 12 F(2) 528.
Alvau v. United States, 33 F(2) 467.
United States v. Dean, 50 F(2) 905.
DePater v. United States, 34 F(2) 275.

In Alvau v. United States, supra, prohibition agents, without a search warrant, went to the defendant's residence at 3.00 o'clock during the night. Some distance from the house they detected an odor of fermenting mash which grew stronger as they approached. They investigated the barn and found in the yard a surface cesspool which was warm and from which arose the odor of fermenting mash. When they received no response to their demands for admission to the house they broke open a basement door and the search finally resulted in the discovery of a secret door in the wall of the basement which led to underground chambers where a distilling operation was discovered.

In condemning this search and seizure the Court said that the forcible entry of the house was not justified, especially since the circumstances within the knowledge of the officers were barely sufficient even in the most favorable view to authorize a magistrate to issue a search warrant.

The Court declared:

"There was here no emergency; it is not a case of a rapidly moving automobile or other instrumental-

> ity employed in violation of the law, or of an outcry from a closed building of murder, or robbery, where immediate action is often necessary. If the information obtained by the government through the sense of smell was sufficient to authorize the issuance of a search warrant, there was no reason why the officers should not have made application therefor, and thus have proceeded in an orderly manner."

Following the rulings of this Honorable Court, evidence was suppressed by reason of an illegal search and seizure in a case paralleling the one at bar with the exception that the defendant in that case was present and refused the agents permission to enter his garage before they began their search. In allowing the Motion to Suppress the Evidence, the Court in United States v. Dean, supra, said:

> "The search was clearly illegal. Officers have no right to enter private buildings without legal justification. Where officers have knowledge that a person in the building is in the act of committing a felony, or possibly a misdemeanor, they may enter without a warrant in order to arrest him and to suppress the crime, and they may enter to arrest a person against whom a warrant is out or who is reasonably suspected of having committed a felony. I am aware of no other cases in which officers are justified in forcing an entrance without a warrant into private property. These principles have been so often stated that a citation of authorities is perhaps unnecessary, but the following may be referred to: Amos v. U. S., 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654; Raniele v. U. S., 34 F. (2d) 877 (C. C. A. 8); Temperani v. U. S., 299 F. 365 (C. C. A. 9); U. S. v. Di Corvo (D. C.) 37 F. (2d) 124 (discussing cases); Russell v. State, 37 Okl. Cr. 71, 256 P. 758."

ADMISSIBILITY OF EVIDENCE.

A seasonable objection was made to the use of evidence resulting from this search on the ground that it was obtained by an illegal search and seizure and for that reason violated sec. 25, tit. 2, National Prohibition Act and the Fourth and Fifth Amendments to the Constitution of the United States. In accordance with prior rulings of the Circuit Court of Appeals for the Fourth Circuit and of this Honorable Court the evidence offered in this case was not admissible against the Petitioner.

Mahoney v. United States (C. C. A. 4th) 26 F. (2) 902;.
Snyder v. United States (C. C. A. 4th) 285 Fed. 1;
Byars v. United States, 273 U. S. 28.

In Snyder v. United States, supra, Judge Groner, speaking for the Circuit Court of Appeals for the Fourth Circuit, said:

"In the Federal Courts evidence obtained from defendant by an unlawful search is inadmissible against him.

Boyd v. United States, 116 U. S. 616;
Weeks v. United States, 232 U. S. 383;
Silverthorne Lbr. Co. v. United States, 251 U. S. 385;
Gouled v. United States, 255 U. S. 398;
Amos v. United States, 255 U. S. 313."

In Byars v. United States, 273 U. S. 28, the defendant was convicted of the possession of strip stamps which were admitted in evidence over his objection that they had been obtained by an unlawful search and seizure. A timely motion made by the defendant was overruled by the trial Court. In reversing the Circuit Court of Ap-

peals which affirmed the judgment of the trial Court, Mr. Justice Sutherland said:

> "Nor is it material that the search was successful in revealing evidence of a violation of a Federal statute. A search prosecuted in violation of the Constitution is not made lawful by what is brought to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our Constitutional system that evidence of crime discovered by a Federal officer in making a search without a lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed."

The above cases were characterized by the Circuit Court of Appeals as "either not in point or not controlling on this court."

CASES CITED.

The Circuit Court based its opinion on

United States v. Nobriga et al., (D. C. of R. I. 1927) 19 Fed. (2) 92.

Kasprowicz v. United States, (C. C. A. 6th, 1927) 20 Fed. (2) 506;

United States v. Berger et al., (D. C. of Mass. 1927) 22 Fed. (2) 867;

United States v. Vottiero, (D. C.—S. D. of N. Y. 1928) 25 Fed. (2) 346;

United States v. Backer, (D. C.—N. D. of Calif. 1929) 32 Fed. (2) 936;

United States v. Borkowski, (P. C.—S. D. of Ohio, W. D. 1920) 268 Fed. 408;

United States v. Lindsly, (D. C.—E. D. La. 1925) 7 Fed. (2) 247.

With the single exception of the Kasprowicz case, supra, these are District Court opinions. The case of

United States v. Lindsly, supra, was reversed by the Circuit Court of Appeals for the Fifth Circuit (1926) 12 F. (2) 771. The Kasprowicz case involved the issuance of a search warrant for the basement of a house used as a dwelling where beer was being manufactured on a large scale. In that case, as the Court said, "The question sharply presented is whether the manufacture of intoxicating liquor in a dwelling house may be of such commercial character as to justify a search warrant." Prohibition agents had observed the operations about this premises for three days. Their observations, contained in the affidavit for the search warrant, were held to justify a conclusion that beer was being manufactured on a commercial scale for commercial purposes. There was no attempt to search the premises without a warrant.

United States v. Nobriga, supra, a Rhode Island District Court case, is concerned with violations of the internal revenue laws. The defendants were indicted on six counts for conducting a distillery without registering the still and otherwise failing to comply with revenue regulations. A search warrant was issued on the affidavit of an agent that he saw a still in operation and smelled fermenting mash. The Court declared that Section 25, title 2 of the National Prohibition Act "is applicable solely to offenses under the National Prohibition Act," and overruled a motion to quash the search warrant made on the ground that it was improvidently issued on an insufficient affidavit. This was a search with a warrant, and not one made without prior judicial determination of probable cause for the search of a permanent structure such as the search in the instant case.

The decision in United States v. Berger, supra, is by the District Court of Massachusetts and was made in a case where officers watching a dwelling house saw five-

gallon cans carried from it and taken away in an automobile. The automobile was searched and found to contain liquor. An odor of mash from the house was detected. A search warrant was applied for and obtained upon an affidavit stating these facts. A search under the warrant disclosed a still of commercial size. By a series of assumptions and inferences and by reading into Section 25 words it does not contain, the conclusion was reached that the search warrant was properly issued. But even in this case, the officers did not undertake to pass on probable cause themselves and search the premises without a warrant.

United States v. Vottiero, supra, was decided by the District Court for the Southern District of New York. In this opinion Section 25 was stretched to the breaking point to uphold a search warrant for a garage in the basement of a private dwelling, nevertheless the garage was considered an integral part of the residence. The question in this case was whether the search warrant was properly issued, and not the total absence of a search warrant for the search of a home at 2:30 at night.

In United States v. Backer, supra, the District Court for the Northern District of California decided a search warrant for a private dwelling was legally issued because the affidavit supporting it showed that it was being used for the unlawful sale of intoxicating liquor.

The case of United States v. Barkowski, supra, was decided by the District Court for the Southern District of Ohio, May 24, 1920. It upheld the search of a private dwelling without a warrant when officers were appraised by sight and odor that a whisky manufacturing operation was going on inside. On November 23, 1921, "An Act Supplemental to the National Prohibition Act" became

law and totally destroyed the effect of this decision when by Section 6 thereof it was made a crime for any officer of the United States to search a private dwelling without a warrant. Its sole aim and purpose was to protect the home against searches without warrants which in themselves are abhorrent to our laws, as this Honorable Court has said, and in direct violation of the Fourth Amendment to the Constitution. Furthermore, the decision in Carroll v. United States, supra, making a necessary distinction between the searches of buildings and vehicles, had not been handed down.

In United States v. Lindsly, supra, the District Court for the Eastern District of Louisiana, disregarding Section 25, title 2 of the National Prohibition Act, Section 6 of the Supplemental Act and the Fourth Amendment to the Constitution, upheld the search of a home without a warrant. While admitting that there was no question of the search of a private dwelling in McBride v. United States, 284 Fed. 416, (C. C. A. 5th) the District Court nevertheless based its opinion on the McBride case and upon the common law rule that an officer could arrest a *person* for a crime committed in his presence. This decision was reversed, 12 F. (2) 771 (C. C. A. 5th). The District Court said:

> "Under the facts as developed on the motion to suppress the evidence, the court concluded that a search warrant was unnecessary, as the evidence showed that before the government officers entered the property, they had ample knowledge through their senses of sight and smell, that an offense was being committed in their presence, and the court considered that the law justified the arrest of an offender and the entering of his property by the government officers for this purpose, as well as for the purpose of search, if and when a violation of the law was being committed in their presence, and the court

considered that the law justified the introduction before the jury of any evidence discovered at the time of the arrest of the offender or of the entering of his property, if and when the officers were justified in making either such arrest (which in this case was not made, as defendant was absent), or such entry because of their knowledge, through their senses, of the commission of an offense then taking place in their presence."

The Circuit Court of Appeals for the Fifth Circuit, basing its reversal of the District Court on the authority of the *Agnello Case,* after commenting on evidence to the effect that before the officers entered defendant's house some one else, whose identity was not established, poured out large quantities of wine, some of which ran into the street, and made his escape, said:

"The officers did not discover defendant in the commission of any crime, *nor did they go to his home for the purpose of making an arrest.* (Italics ours.)

"Section 25 of title 2 of the National Prohibition Act (Comp. St. Ann. Supp. 1923, sec. 10138½m) provides that no search warrant shall issue to search any private dwelling, unless it is being used for the unlawful sale of liquor, or in part for some business purpose, and Section 6 of the Act of November 23, 1921, 42 Stat. 223 (Comp. St. Supp. 1925, Sec. 10184a), makes it an offense for a prohibition officer to search a private dwelling without a search warrant. In Pressley v. United States, 289 F. 477, this Court held that the search of a private dwelling under a warrant which failed to charge an unlawful sale was unauthorized, and that evidence procured by such a search was inadmissible. And our ruling in Voorhies v. United States, 299 F. 275, is to the same effect.

"Here no warrant was procured, and no attempt was made to comply with Section 25 of the Prohibi-

> tion Act. * * * It is suggested by the government that the officers were made aware of violations of the law by seeing and smelling the wine which had been poured out on the premises, and that therefore it was proper to receive the evidence. But it remains true that the officers did not acquire information which tended to show that a violation of the law had been committed as an incident to a lawful arrest, and we are of opinion that the evidence should have been rejected upon the authority of Agnello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. ——, where it was plainly held that 'the search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws,' and that, 'save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant. * * * Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant.'
>
> "That case was decided since the trial of this case, and in our opinion compels the reversal of the judgment of the District Court."

The above cited cases were held to be in point and controlling upon the Circuit Court in its opinion in the instant case and upon them the Court based its opinion.

In DePater v. United States, 34 F. (2) 275, from which the statement is quoted that, "It is too well determined to require argument that knowledge of a crime may be acquired through the sense of smell alone," it was held that smell alone did not justify the search of a private dwelling in that case.

Benton v. United States, (Fourth Circuit, 1928) 28 F. (2) 695, cited in support of the opinion in this case is an example of how sometimes a Court in the pursuit of a

minor principle loses sight of more fundamental and basic principles and, unintentionally perhaps, encroaches upon and violates them. In the *Benton case* prohibition agents went to the home of the defendant during the night and secreted themselves in some vines near the defendant's yard. About daybreak they heard a pump being used in a woodshed near the defendant's dwelling house and saw the defendant and others carrying a can which they placed in a nearby automobile. The officers later found that the can contained five gallons of alcohol. Upon hearing the pump inside the shed being operated and seeing the can carried, the agents entered the defendant's premises, arrested him and a boy and searched the woodshed where they found a quantity of whisky. The Circuit Court justified this invasion on the ground that the officers saw a crime committed in their presence. However, this same Circuit Court was unwilling to fully condone this decision when it held in the DePater Case (1929), Judge Northcott who wrote the opinion in the Benton Case dissenting, that the odor of mash eminating from a dwelling house was not justification for breaking in and searching a house without a warrant. The Circuit Court reaffirmed the Henderson Case and said:

> "The effect of the decisions, while recognizing the right of search as an incident to a lawful arrest, is to require the utmost caution in the search of private residences and to require as a prerequisite thereto such a degree of certainty of the knowledge of both the nature and the instant perpetration of the crime as the officers herein failed to exhibit and as the evidence failed to disclose in the instant case."

Contrary to the statement in the Circuit Court's opinion in the case at bar that, "Here the defendant had the reputation of being a violator of the National Prohibition Law. The officers knew he had been convicted of

such a violation. Complaints had been made to them about the garage being used for the storing of whisky used in such violations," Agent Ford testified on direct examination (R. 10) that the complaints received were about "a place on Curtis Avenue that was being used to store whisky." Ford thought Taylor's name had been mentioned in the last complaint received, but none of the agents knew Taylor or had ever seen him until he appeared at his garage after the forced entry, search and seizure had been made. There was no evidence that Taylor had a reputation as a violator of the Prohibition Law. As a result of this invasion of his home, the agents later learned he had been convicted of liquor violations. But prior to the entry, they had no knowledge that it was Taylor who lived in this house, nor did they obtain any of this knowledge except as a result of this search.

The clear reasoning and accurate language of the Slusser case is likewise applicable to the case at bar:

> "An unlawful search cannot be justified by what is found. A search that is unlawful when it begins is not made lawful when it ends by the discovery and seizure of liquor. It was against such prying, on the chance of discovery, that the constitutional amendment was intended to protect the people.
>
> "Neither is the discretion of the officer, however good and well-intentioned, a substitute in law for a search warrant issued by a proper magistrate. It is to the latter that the law has committed the discretion to say when a warrant shall issue; and it can only issue on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized. *Constant reiteration of these fundamental principles is warranted by the fact that they seem to be so frequently overlooked.* (Italics ours.)

"The procedure for searches under the Volstead Law (41 Stat. 315) is prescribed by section 25 to be that defined in the Act of June 15, 1917, tit. 11, Compiled Statutes, Par. 10496¼a et seq. The entry without permission ,express or implied, into a private garage, without warrant, on a mission of search and seizure, by prohibition agents of the United States, is unlawful. Even a search for stolen goods requires a warrant. It was so by common law before the adoption of the Constitution. Lord Camden in Entick v. Carrington, 19 Howell's State Trials, at page 1067."

CONCLUSION.

It is respectfully submitted that the search of petitioner's garage, which was a part of his residence, at 2:30 o'clock during the night and in which no person was present committing a crime was unreasonable, unlawful, illegal, unauthorized and in violation of the Fourth and Fifth Amendments to the Constitution of the United States, contrary to Section 25, Title 2 of the National Prohibition Act, and to Section 6 of an Act Supplemental to the National Prohibition Act, approved November 23, 1921, and that the Circuit Court of Appeals for the Fourth Circuit erred in upholding such a search when a timely challenge to the evidence and information gained as a result of the search was interposed.

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